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83-130

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD MEADOWS and DREW WAGNER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether The Trial Court Erred In Denying Petitioners' Motion To Stay Proceedings And For An Evidentiary Hearing Pursuant To The Jury Selection And Service Act Where (A) Petitioners Had An Unqualified Right To Review Records Pertaining To The Process By Which The Petit Jury Panels Were Selected: (B) The Government Failed To Furnish Access To Such Records Resulting In A "Substantial Failure" To Comply With That Act: And (C) Petitioners Challenged The Jury Selection Process And Vigorously Sought To Examine Records Needed To Support Their Challenge To The Jury Selection Procedures Long Before The Petit Jury Panel For This Case Was Drawn, Which Resulted In Petitioners' Waiver Of A Jury Trial After The Trial Court's Denial Of Their Motion.

II.

Whether The Evidence Adduced At Trial Was Sufficient To Establish That Petitioner Richard Meadows Was Guilty Beyond A Reasonable Doubt Of The Offense Of Conspiracy To Distribute Marijuana Where There Was No Direct Testimony That He (1) Received Or Delivered Any Marijuana, (2) Possessed A Stake In A Venture To Distribute Marijuana, Or (3) Transferred Or Received Marijuana-Related Money, But Rather, The Evidence Showed Only That He Was Present At Two Transactions Without Participating Therein.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

RICHARD MEADOWS and DREW WAGNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, Flint, is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit is not reported and is printed in Appendix A hereto, *infra,* page 1a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on May 27, 1983, and a copy thereof is appended hereto

in Appendix A, *infra*. Rehearing was not sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

STATUTES INVOLVED

The relevant statutory provisions are set out in Appendix B, *infra*, at page 4a.

STATEMENT OF THE CASE

On August 28, 1981, Petitioners, Richard Meadows and Drew Wagner were indicted for violating 21 U.S.C. Section 846, Conspiracy to Distribute Marijuana.[1] The matter was scheduled for trial on January 5, 1982.

On December 30, 1981, Defendants filed their "Motion for Evidentiary Hearing, to Stay Proceedings, and for Selection of a Petit Jury in conformity with the Jury Selection and Service Act and Sixth Amendment," alleging that the Petit Jury panel of this case, which had been drawn on 23 December, 1981, had not been selected in conformity with the provisions of the Jury Selection and Service Act. 28 U.S.C. Section 1861 et seq.

More particularly, it was alleged that, pursuant to 28 U.S.C. Section 1863, the Eastern District of Michigan, Southern Division, had adopted a Jury Selection Plan which called for persons to be selected from voter registration lister for placement in a master jury wheel at periodic intervals not exceeding four (4) years. Under the local plan, these persons would be mailed qualification

[1] A total of 13 defendants were charged in this indictment. Of those, the convictions of six defendants were consolidated for purposes of Appeal by the United States Court of Appeals for the Sixth Circuit.

forms and would be placed in a qualified jury wheel unless the forms disclosed a statutory basis for exemption from jury service. Additionally, however, persons could request excusal from jury service if a person were over the age of seventy or had served upon a Federal Grand or Petit Jury within the previous two years.

It was alleged that the Petit Jury Panel for this case was drawn on December 23, 1981, from a master wheel which had been created from 1976 voter registration lists and, thus outside of the permissible four year interval established by 28 USC Section 1863 (b) (4) and Section 5.2 of the local plan. It was further alleged that Defendants were restrained in their ability to establish the substantiality of this non-compliance because they had been denied access to records relating to the process by which persons were selected for inclusion in the master jury wheel and the qualified jury wheel in violation of 28 USC Section 1867 (f).

The relief sought was a stay of proceedings and an evidentiary hearing to ascertain the substantiality of the foregoing violations. 28 USC Section 1867 (d). A hearing upon the merits of this Motion was held on January 5, 1982, with the Trial Court denying that Motion on the basis of "timeliness" and "the substantiality of the question of the defects alleged." (T. 1/5/82, p. 62, 68-82). At this juncture, all Defendants waived a Trial by Jury and this case proceeded to be tried by the Court.

The Government's first witness at the trial was Patrick Bolerjack who testified that in the early 1970's he entered into a partnership with Frank Reynolds and Roy Griffith for the purpose of selling marijuana.

Bolerjack had met Ricky Meadows on three occasions, two of which were apparently social in nature and unrelated to marijuana.[2] He had also met Ricky Meadows a third time, this being in the Winter of 1976 and the day after a van containing five hundred pounds of marijuana had been delivered to the Howell, Michigan distribution site. According to Bolerjack, Ricky Meadows and Frank Reynolds "arrived on location to make sure that the amount that we received was the amount that was sent." 5 T 162. However, when asked directly what activity engaged in by Ricky Meadows generated this conclusion, Bolerjack responded as follows:

Q: Did you observe any activity on the part of Mr. Meadows at that time?
A: Yes.
Q: What did you observe?
A: I observed this weighing the marijuana.
Q: What was the purpose of the weighing of the marijuana?
A: To see exactly how much was there.
Q: Who was present for this weighing?
A: Frank Reynolds, myself and Drew Wagner.
5 T 163)

Bolerjack also testified, over objection, that Frank Reynolds had told him that Ricky Meadows was "one of the suppliers for Frank Reynolds. (5 T 161-162).

Gregory Konrad testified that he had once met Ricky Meadows at a house in Florida which he believed to have been owned by Drew Wagner. At this time, the following events transpired:

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[2] Bolerjack had met Ricky Meadows in a house in Ft. Lauderdale where nothing occurred and at the Detroit Auto Show in 1976. 5 T 162, 168.

Q: Apart from the house, who was present?
A: At that meeting, Drew and Ricky, Frank Reynolds and myself.
Q: What were these people doing, that is Drew and the person you referred to as Drew Wagner and Rick Meadows?
A: Showing Frank Reynolds marijuana.
Q: And where were they showing this marijuana?
A: In a residence. In a residential house.
Q: Can you describe where in the residence the marijuana was?
A: The marijuana was set up on a pool table.
Q: How was the marijuana packaged?
A: These happened to be fairly large bales in burlap.
Q: What sort of activity took place?
A: Cutting into the bales, looking at it and trying to decide if he wanted to take it, sell it.
Q: Did Frank do the cutting into the bales?
A: Yes. Frank was doing the buying.
Q: How much marijuana was involved in this particular occasion.
A: This particular occasion, I estimate in the neighborhood of a hundred, hundred and fifty pounds.
Q: Did anyone assist you in any way with this marijuana?
A: Can you ask that question in a different way?
Q: Was the marijuana taken from the premises?
A: Yes. Marijuana was loaded into Frank Reynolds car.
Q: Did anyone assist you in loading the marijuana?
A: Myself, Frank Reynolds and Drew, who I now know as Drew Wagner, loaded it into Frank's car.
(5 T 465-467)

Konrad also testified that he had purchased a van, with money supplied by Frank Reynolds, which had been "outfitted for me" to haul marijuana by the placement of a bed in its interior. (5 T 461). Although Konrad had no

direct knowledge as to who had altered this van, he was told "by Frank Reynolds that it was done by Ricky Meadows."

Based upon the foregoing, the Trial Court determined that Ricky Meadows was a participant in a conspiracy to distribute marijuana, (12 T 1023-1032), sentencing Ricky Meadows to a term of five years imprisonment and a fine of Fifteen Thousand ($15,000.00) Dollars. Petitioner Drew Wagner was convicted and sentenced to a term of two years imprisonment and ordered to pay a fine as well.

REASONS FOR GRANTING WRIT

I.

The purpose of the Jury Selection and Service Act of 1968, 28 USC, Section 1861, et seq., was to eliminate the 'key man' system of juror selection, *Davis* v. *United States,* 411 US 233; 93 S. Ct. 1577; 36 L.E.D. 216 (1973), and to assure that the petit jury would be "selected at random from a fair cross section of the community in the district where the court convenes."

The Act requires that each District develop a Plan for selection of petit jurors and that this Plan include (A) specification of the list from which names would be drawn for inclusion in a master jury wheel, which must be periodically emptied and refilled at intervals not exceeding four years, (B) provisions for the drawing of names from this master jury wheel and the mailing of juror qualification forms to all persons so drawn, and (C) specification of those groups or classes of persons who are exempt from jury service or who may be excused upon individual request. 28 USC Section 1863 (a) (b) (4) (5) (6); 28 USC Section 1864; 28 USC Section 1965 (b). All persons whose names are drawn from the master jury wheel and who are neither exempt nor excused are placed in a qualified jury wheel — it is from this qualified jury wheel that a particular jury panel is drawn. 28 USC Section 1866 (a).

Consistent with these provisions, the *Jury Selection Plan for the Eastern District of Michigan* authorizes utilization of voter registration lists for preparation of the master wheel, mandating, however, that the master wheel be emptied and refilled every four years.

Here Petitioners' "Motion for Evidentiary Hearing"[3] alleges that, despite the existence of an Order commanding the drawing of a new master wheel from 1980 voter registration lists, the Clerk drew the jury panel for this case from a jury wheel created by reference to 1976 voter registration lists. In so doing, the Clerk violated 28 USC Section 1863 (b) (4) and Section 5.2 of the local Plan.

This violation would entitle Defendants to a stay of proceedings and evidentiary hearing only upon proof that there was a "substantial failure' to adhere to the requirements of the Act, resulting in jury lists which were not fairly representative of the community. See, *United States* v. *Tarnowski,* 429 F. Supp. 783, 791 (ED Mich., 1977) aff'd 583 F.2d 903 (6th Cir., 1978). Presumably, such a 'substantial failure' could be demonstrated only by comparing the demography of the community existing in 1980 with the demography of the master wheel which had been created from 1976 voter registration lists. Recognizing this burden, Defendants vigorously sought access to the master jury wheel records, doing so long before December 23, 1981 or the time where the actual panel for this case was drawn. (4 T 110-111; T 12/23/81, 66-67). Yet those records were never produced, a circumstance which virtually rendered it impossible to demonstrate a 'substantial failure'.

As indicated in *Test* v. *United States,* 420 US 82; 95 S Ct 749; 42 LEd 2d 786, 789 (1975), Defendants had

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[3] R. 26. The full title of this Motion reads "Motion for Evidentiary Hearing, To Stay Proceedings, And for Selection of a Petit Jury in Conformity With the Jury Selection and Service Act and Sixth Amendment."

> essentially an *unqualified* right to inspect jury lists. (The Act) grants access in order to aid parties in the 'preparation' of motions challenging jury—selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.

The import of *Test* is clear—the failure to permit inspection of jury lists is itself a 'substantial failure' to comply with the Jury Selection and Service Act entitling a Defendant to a stay of proceedings and an evidentiary hearing. In the face of *Test*, the Trial Court thus erred in holding that Defendants had failed to establish 'substantial failure' and, since the "Motion for Evidentiary Hearing" was filed well before Trial, also erred in holding that the Motion was untimely. See, 28 USC Section 1867 (a).

It was only after denial of that Motion that Petitioners waived the jury. The Court of Appeals below should have reversed the resulting convictions and remand this action for a New Trial and for the opportunity to intelligently determine "whether the jury selection process warrants challenge and as to whether (Defendants) prefer trial by a *representative* jury or before the court." *United States* v. *Davis*, 592 F2d 887, 890 (5th Cir., 1979), (emphasis added).

II.

The essential elements of a criminal conspiracy are an agreement between two or more persons to commit a crime and an overt act in furtherance of that agreement. *United States* v. *Williams*, 503 F2d 50 (6th Cir., 1974); *United States* v. *Myers*, 646 F2d 1142 (6th Cir.,

1981). "The gist of the crime of conspiracy . . . is the unlawful agreement," *United States* v. *Hearn,* 496 F2d 236, 241 (6th Cir., 1974), and it is an intent to agree upon and pursue a common object which distinguishes conspiracy from other relationships such as that of buyer-seller, *United States* v. *Ford,* 324 F2d 950 (7th Cir., 1963), or aider and abettor. *Nye & Nissen* v. *United States,* 336 US 613, 620; 69 S Ct 766; 93 L ed 919 (1948); *United States* v. *Greer,* 467 F2d 1064, 1071 (7th Cir., 1972); *United States* v. *Purin,* 486 F2d 1363, 1369 (2nd Cir., 1973).

This participation may be inferred from circumstantial evidence, or from a "development and collocation of circumstances," *Glasser* v. *United States,* 315 US 60, 80; 62 S Ct 457; 86 L ed 680 (1942), so long as the quality and character of that evidence is sufficient to establish, beyond a reasonable doubt, knowing participation in a scheme to violate the law. *United States* v. *Webb,* 359 F2d 558, 562 (6th Cir., 1966); *United States* v. *Chambers,* 382 F2d 910, 913 (6th Cir., 1967). The fact that a conspiracy has been proven does not mean that the evidence required to sustain a conviction regarding an individual's participation is any less than necessary to support a finding that a person committed any other crime. *United States* v. *Harris,* 522 F2d 1283 (7th Cir., 1976). This is because "(g)uilt with us remains individual and personal even as respects conspiracies. It is not a matter of mass application." *Kotteakos* v. *United States,* 328 US 750, 772; 66 S Ct 1239; 90 L Ed 1-57 (1946). Thus, each defendant in a conspiracy prosecution is entitled to an individualized evaluation of the record to determine if it supports a conviction. *Anderson* v. *United States,* 417 US 211, 223-224; 94 S Ct 2253; 41 L Ed 2d 20 (1974).

Where relied upon, circumstantial evidence must thus be sufficient to support the inference that an individual intended to participate in a known conspiracy. *United States* v. *Bostic,* 480 F2d 965, 968 (6th Cir., 1973). Oftentimes, this inference is drawn from evidence indicating that an individual had a "stake in the venture", *United States* v. *Woods,* 544 F2d 242 (6th Cir., 1976), or of "continuous planning and cooperation (among) the persons involved," particularly where that activity takes place at critical junctures of the ongoing conspiracy. *United States* v. *Avail-Dominguex,* 610 F2d 1266, 1272 (5th Cir., 1980). But evidence indicating that an individual merely associated with alleged co-conspirators, knew of the conspiracy, or was present during conspiratorial discussions is insufficient to sustain a conviction unless supplemented by evidence that he knowingly joined that conspiracy. *United States* v. *Webb,* 359 F2d 558, 562 (6th Cir., 1966); *United States* v. *Williams, supra,* 503 F2d at 54; *United States* v. *Richardson,* 596 F2d 157, 162 (6th Cir., 1979).

As indicated in *United States* v. *Alvarez,* 610 F2d 1250, 1256, (5th Cir., 1980):

> . . . even if a conspiracy between two parties is established, not every act of a third person that assists in the accomplishment of the objective of the conspiracy is a sufficient basis to demonstrate his concurrence in that agreement.

Voluntary participation in unlawful acts is insufficient to draw an individual within the net of a conspiracy since, to become a coconspirator, "(h)e must in some sense promote their venture himself, make it his own, have a stake in the outcome." *United States* v. *Falcone,* 109 F2d 579 (2nd Cir., 1940) aff'd 311 US 205; 61 S Ct 204; 85 L Ed

128 (1943). Instead there must be evidence that the accused not only knew of the conspiracy but also that he voluntarily contributed his efforts with the intent of furthering the conspiratorial objectives. *United States* v. *Levinson*, 405 F2d 828, 985-986 (6th Cir. 1968); *United States* v. *Littrell*, 574 F2d 828, 832 (6th Cir., 1978).

In meeting its burden, the Government may rely upon coconspirator declarations to establish participation, *United States* v. *Enright*, 579 F2d 980 (6th Cir., 1979); *United States* v. *Vinson*, 606 F2d 149 (6th Cir., 1979), if the Government establishes that such statements were made both during the course of and in furtherance of the charged conspiracy. FRE 801 (d) (2) (E). As indicated in *Krulewitch* v. *United States*, 336 US 440, 443-444; 69 S Ct 716; 93 L Ed 790 (1949):

> This prerequisite to admissability, that hearsay statements by some conspirators to be admissable against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts.

It is the burden of the Government to thus lay a foundation for the introduction of coconspirator statements sufficient to support the inference that these statements were made during and in furtherance of the conspiracy. *Wiborg* v. *United States* 163 US 632; 16 S Ct 1127; 41 L Ed 289 (1896); *Logan* v. *United States*, 144 US 263; 12 S Ct. 617; 36 L Ed 429 (1892). And mere conversation between coconspirators or merely narrative declarations are not admissible as statements in furtherance of the conspiracy. *United States* v. *James*, 510 F2d 546 (5th Cir. 1975). Instead, "the declaration must itself be an act in furtherance of the common object; mere conver-

sation between conspirators is not that . . ." *United States* v. *Nardone,* 106 F2d 41, 43 (2nd Cir., 1941) *rv'sd on othr grnds* 308 US 338; 60 S Ct 266; 84 L Ed 307 (1939). Whether a particular statement tends to advance the objectives of the conspiracy can only be determined by examination of the context in which it is made. See, e.g., *United States* v. *Rucker,* 586 F2d 899 (2nd Cir., 1978); *United States* v. *Warren,* 578 F2d 1058 (5th Cir., 1978). Where that context is not displayed and where no specific purpose underlying the statement can be discerned, it should be held inadmissible. See, *United States* v. *Moore,* 552 F2d 1068 (9th Cir., 1975).

Where the evidentiary basis of a conviction is challenged, ". . . the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt *Jackson* v. *Virginia,* 443 US 307; 99 S Ct 2781; 61 Led 2d 560, 573 (1979).

Only two witnesses — Patrick Bolerjack and Gregory Konrad — testified to having met Ricky Meadows.

Konrad had once met Ricky Meadows in Drew Wagner's house located in Florida where Frank Reynolds was being shown marijuana which was baled in burlap. At this time, Reynolds inspected the marijuana by cutting the burlap covers after which it was transferred to an automobile by Reynolds, Konrad, and Drew Wagner. (5 T 465-467). Bolerjack had once observed Richard Meadows to have been present at a home in Howell, Michigan, on the day after a shipment of marijuana had been received there. Although Bolerjack stated that the purpose of Meadow's presence was to "make

sure that the amount we received was the amount that was sent," when the actual weighing of this marijuana occurred, it was done only in the presence of "Frank Reynolds, myself (Bolerjack), and Drew Wagner." (5 T 162-163).

Thus, the evidence, independent of coconspiratorial hearsay, establishes that Richard Meadows was merely present on two occasions when others were involved in marijuana-related transactions. There is no testimony that Richard Meadows performed any acts on either of these occasions and, as indicated in *United States* v. *Garcia*, 562 F2d 411, 414 (7th Cir., 1977):

> Mere association with conspirators, knowledge of a conspiracy and/or presence during conspiratorial discussions will not suffice to convict a man of conspiracy. Instead, there must at least be evidence to support the inference that the defendant in some way joined and participated in the conspiratorial scheme.

Patently, the acts of associating and being present with persons whose guilty has been established is insufficient to sustain a finding the Richard Meadows entered into an agreement to distribute marijuana and intentionally contributed his efforts to the advancement of a common scheme.

It is true that Konrad also stated that he had purchased a van which had been "outfitted" to haul marijuana by the placement of a bed in its interior and that he had been told by "Frank Reynolds that (this) had been done by Ricky Meadows." (5 T 462). Yet there was no testimony that, at the time the van was altered, Meadows intended to do anything but furnish lawful goods and services. Just as ". . . one does not become a

party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy," *Direct Sales Co.* v. *United States,* 318 U.S. 703; 63 S Ct 758; 87 L Ed 1125 (1943), ". . . mere discussions susceptible of either a legal or illegal interpretation," do not sustain a finding of an agreement to violate the law. *United States* v. *Wieschenberg,* 604 F2d 326, 335 (5th Cir., 1979).

What this hearsay statement does suggest, however, is that Meadows was engaged in a lawful business centering upon the building of recreational vehicles. This inference is strengthened by the testimony of Bolerjack that Meadows had attended the Detroit Auto Show in the Winter of 1976 — precisely the same time when Bolerjack had seen Meadows at the Howell, Michigan, residence in the presence of others. (5 T 178) Piecing together the events actually viewed by the witnesses thus products a reasonably innocent explanation of Meadow's activity — he was engaged in a lawful business, knew Drew Wagner, and had travelled with Drew Wagner from Florida to Michigan for the purpose of attending the Detroit Auto Show.

To be sure, Bolerjack also testified that he had been told by Frank Reynolds that Meadows "was one of the suppliers." (5 T 160-161). Absent this statement, the eivdence is insufficient to establish Meadow's participation in a conspiracy and, therefore, it was error to admit this statement. *United States* v. *White,* 569 F2d 623, 267 (1978). Furthermore, in light of the remaining testimony that Richard Meadows had supplied lawful services to Frank Reynolds, this statement is ambiguous as to what

Meadows was, in fact, "supplying".[4] Given this circumstance, it was incumbent upon the Government to lay a foundation showing the context in which this statement was made and that it was made in furtherance of the conspiracy. That foundation was not laid and, accordingly, this hearsay statement should not have been admitted into evidence. *United States* v. *Moore*, *supra*. Additionally, its ambiguity cannot sustain a finding that Ricky Meadows joined and participated in a conspiracy to distribute marijuana. *United States* v. *Wieschenberg*, *supra*, 604 F2d at 326.

Since the evidence was insufficient to sustain the inference that Ricky Meadows entered into an agreement to distribute marijuana and thereafter engaged in an overt act to further that agreement, the resulting conviction should have been reversed.

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[4] The Trial Court recognized tha Bolerjack had *not* testified that Frank Reynolds stated that Ricky Meadows was a supplier of marijuana as opposed to lawful services, finding merely that Bolerjack "was told by Reynolds that Meadows was one of Reynolds' suppliers." (12 T 1024)

CONCLUSION

The judgment below represents a departure from the statutory mandate of the Jury Selection and Service Act as well as the established principles relating to the offense of conspiracy. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX "A"

Nos. 82-1331
82-1332
82-1346
82-1347
82-1348
82-1370

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD MEADOWS, DREW WAGNER, KENNETH SPRAKER, ROBERT JINX CASTRO, ROY CASTRO, PATRICK CONWAY,

Defendants-Appellants.

Before: LIVELY and ENGEL, *Circuit Judges*; and PECK, *Senior Circuit Judge*

ORDER
(Filed MAY 27 1983)

The six defendants named in this appeal challenge their convictions for conspiracy to distribute marijuana in violation of 21 U.S.C. § 846. All six collectively argue that the district court erred in denying their jury selection challenges as untimely. Additionally, defendants Robert Castro and Richard Meadows individually contend that insufficient evidence was adduced at trial to establish their knowing participation in the conspiracy.

The defendants were indicted on August 28, 1981 and tried on January 6, 1982. Although District Judge Newblatt set a motion cut-off date of November 30, 1981,

the record shows no attempt to gain access to jury selection materials until November 27, 1981. A motion to dismiss the indictments for substantial failure to comply with provisions of the Jury Seleltion and Service Act of 1968, 28 U.S.C. §§ 1861 *et seq.*, was not made until December 14, 1981. District Judge Feikens conducted a hearing on this matter, but denied the motion as untimely under the Act due to the lack of diligence by defense counsel in not raising the issue earlier.

Upon a review of the record as a whole, the court is of the opinion that there was overwhelming evidence to support the conclusion that a conspiracy to distribute marijuana existed during the periods of Meadow's and Robert Castro's involvement. "One the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it." *Poliafico* v. *United States,* 237 F.2d 97, 104 (6th Cir. 1956), *cert. denied,* 352 U.S. 1025 (1957). The court believes that there was ample evidence from which the trial judge could find beyond a reasonable doubt that Meadows and Robert Castro each had knowledge of that conspiracy and adopted it as his own by actions calculated to further its objectives. *Id.*

There is no merit in the claim of alleged noncompliance with the Jury Selection and Service Act since the challenge was not timely made. The exclusive means of presenting such challenges in this situation requires an appropriate motion "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. § 1867(a). In dismissing the motion, Judge Feikens found that "defendants' counsel did not show diligence in raising this matter for the first time [until after over three months of trial preparation]." Recognizing that "[t]he [timeliness] requirements of the statute are strictly enforced," *United States* v. *Young,*

570 F.2d 152, 153 (6th Cir. 1978), we find no abuse of discretion in this ruling. *Cf. United States* v. *Foxworth*, 599 F.2d 1, 3 n.3 (1st Cir. 1979) (section 1867 motion found untimely when filed nine days after indictment and eight days after appointment of counsel who knew of grounds for challenge at time of appointment). Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: JUNE 20, 1983
COSTS: NONE
A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By /s/ Linda L. Brinson
Deputy Clerk
(Seal)

APPENDIX "B"

Title 21, United States Code, Section 846 provides:

> §846. Attempt and conspiracy
>
> Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 28, United States Code, Section 1863 provides:

> § 1863. Plan for random jury selection
>
> (a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title [28 USCS §§ 1861, 1862], and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any

time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies herewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall—

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: Provided, however, That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be

fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title [28 USCS §§ 1861, 1862]. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title [28 USCS §§ 1861, 1862].

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names

of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5) specify those groups of persons or occupational classes whose members shall, on indi-

vidual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title [28 USCS §§ 1861, 1862].

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title [28 USCS §§ 1861, 1862]. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held.

(8) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits

these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(9) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within on hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968 [Mar. 27, 1968]. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

Title 28, United States Code, Section 1864 provides:

§ 1864. Drawing of names from the master jury wheel; completion of juror qualification form

(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk or jury commission shall prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to the district court plan and to sections 1867 and 1868 of this title [28 USCS §§ 1867, 1868]. The clerk or jury commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk or jury commission by mail within ten days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk or jury commission shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk or jury commission within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the clerk or jury commission forthwith to appear before the clerk or jury commission to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the clerk or jury commission may, at the discretion of the district court, except where his prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under sec-

tion 1871 of this title [28 USCS § 1871]. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence or the jury commission of the clerk of the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk or jury commission may be noted on the juror qualification form and transmitted to the chief judge or such district court judge as the plan may provide.

(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the district court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than three days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than three days, or both.

Title 28, United States Code, Section 1865 provides:

§ 1865 Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of

names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understands the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

Title 28, United States Code, Section 1866 provides in part:

§ 1866. Selection and summoning of jury panels

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such weel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury

commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel. . . .

Title 28, United States Code, Section 1867 provides in part:

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

• • •

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title [28 USCS § 1867].

• • •

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title [28 USCS § 1863(b)], and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.